Supreme Court, U.S.
FILED
JUL 26 1993

No. 93-152

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1993

RICHARD C. WALL,

Petitioner,

—against—

ROCKWELL INTERNATIONAL CORPORATION,

Respondent.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Whether the dismissal of a plaintiff's Complaint for failure to serve same within 120 days of filing is inappropriate pursuant to Rule 4(j) and its proposed successor, 4(m), where plaintiff's cause of action is consequently barred by the running of the applicable statute of limitations.

Whether a correct interpretation of current Rule 4(j) renders violation of a local rule, actual notice, ongoing settlement discussions, a lack of prejudice, and the running of the applicable statute of limitations "good cause" for petitioner's failure to serve his Complaint within 120 days of its filing.

## PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are those set forth in the caption.

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No.

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1993**

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RICHARD C. WALL,

Petitioner,

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ROCKWELL INTERNATIONAL CORPORATION,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

---

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this action on March 26, 1993.

## OPINIONS BELOW

The United States District Court for the Northern District of Iowa, on August 5, 1992, dismissed Richard C. Wall's Complaint against Rockwell International Corporation. (App., infra, 3a). The decision of the United States District Court for the Northern District of Iowa was affirmed by the United States Court of Appeals for the Eighth Circuit on March 26, 1993. (App., infra, 1a). Neither decision was published.

## BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Eighth Circuit was entered in this case on March 26, 1993.[1] This court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C.S. §1254(1) (Law. Co-op. 1988 & Supp. 1993).

## CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Fed. R. Civ. P. 4(j) provides:

**Summons: Time Limit for Service**

If a service of the summons and complaint is not made upon a defendant within 120 days up to the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within the period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a

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[1] On June 16, 1993, Justice Harry Blackmun entered an Order granting Petitioner Richard C. Wall's application for extension of time in which to file his Petition for a Writ of Certiorari, and extended the applicable filing deadline to July 26, 1993.

foreign country pursuant to subdivision (i) of this rule.

Proposed Rule Fed. R. Civ. P. 4(m):

**Time Limit for Service.**

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) of (j)(1).

Local Rule 19(b)(2) for the United States District Court for the Northern District of Iowa provides:

> At least ten (10) days prior to the expiration of any of the times specified above*, the Clerk shall mail to all counsel of record a copy of this rule and a notice that the action will be dismissed unless within the time allowed herein the action required is taken or good cause for not dismissing the action is shown.

*One of the "times specified above" is found in Local Rule 19(b)(1)(A), which states:

> Civil actions shall be dismissed by the Clerk without prejudice: where service has not been made on any defendant within one hundred twenty (120) days after the filing of the complaint, and plaintiff has failed to file a statement in writing within one hundred twenty-seven (127) days after the filing of the complaint setting forth good cause why service has not been made.

## STATEMENT OF THE CASE

Rockwell International Corporation ("Rockwell") constructively terminated Wall's thirty-two year employment in early August of 1989 in granting him seventy-two hours to contemplate "early retirement" in violation of the Age Discrimination in Employment Act, 29 U.S.C.S. § 621 et seq. (Law. Co-op. 1990 & Supp. 1993) ("ADEA"). Prior to filing suit, counsel for Wall commenced ongoing correspondence with Rockwell in order to assemble relevant facts to be used in evaluating Wall's claim and to construct a potential settlement. This correspondence was received by both outside and corporate counsel for Rockwell. Additionally, several meetings between counsel for Wall and Rockwell personnel took place.

On or about July 29, 1991, counsel for Wall delineated, via facsimile, some suggestions for a potential settlement of the dispute between Wall and Rockwell. This request specifically made Rockwell aware of the pending expiration of the statute of limitations on Wall's claim. Counsel for Rockwell, in correspondence dated August 5, 1991, responded to Wall's suggestions.

Wall filed a Complaint against Rockwell on August 6, 1991, seeking relief from the 1989 constructive discharge pursuant to the ADEA. Filing the Complaint preserved Wall's claim under the ADEA's two year statute of limitations. While Rockwell was given actual notice of the suit on the date it was filed, via receipt by counsel for Rockwell of a copy of the Complaint, service was not commenced. Prior and subsequent to the filing of the Complaint, Wall and Rockwell

engaged in settlement discussions and an exchange of information.

Counsel for Petitioner acted in response to a precarious situation. While suit needed to be filed to preserve Wall's claim, the requisite factual details to support the claim were not yet fully available from Defendant. Subsequent to the filing of the Complaint Wall requested further documentary information, and withheld formally serving the Complaint pending receipt of such information. Nearly two and one-half months later, counsel for Plaintiff received the requested information from Rockwell.

On December 30, 1991, 146 days after the Complaint was filed, the Clerk of Court filed a Notice of Dismissal which stated as follows:

> This action is dismissed pursuant to Local Rule 19, a copy of which is attached, unless some action is taken by not later than Thursday, January 9, 1992. (Emphasis added).

This notice was received after the expiration of Rule 4(j)'s 120 day service deadline despite Local Rule 19(b)'s mandate that the Clerk shall provide notice to all counsel at least 10 days prior to the expiration of the 120 day service time limit.[2]

On January 7, 1992, Wall filed an Application in Resistance to Involuntary Dismissal delineating specific reasons why an involuntary dismissal should not be granted. Eight days later Rockwell was formally served with the Summons and Complaint, a copy of which had been in Rockwell's possession since August 6, 1991.

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[2] See supra. pg. 3.

Defendant moved to dismiss on January 21, 1992, claiming untimely service under Rule 4(j). The District Court granted Defendant's motion 197 days later, on August 5, 1992. The Eighth Circuit Court of Appeals affirmed the District Court's decision on March 26, 1993.

Subject matter jurisdiction over this case was vested in the District Court pursuant to 28 U.S.C.S. § 1331 (Law. Co-op. 1986 & Supp. 1993) and in the Eighth Circuit pursuant to 28 U.S.C.S. § 1291 (Law. Co-op. 1986 & Supp. 1993).

## REASON FOR GRANTING THE PETITION

Fed. R. Civ. P. 4(m), proposed by the United States Supreme Court as a replacement to Federal Rule of Civil Procedure 4(j), and the corresponding comments thereto, directly contravene the Eighth Circuit's decision in this case.[3] Specifically, Rule 4(m) concludes that the actual prejudice that Wall may suffer due to the expiration of the applicable statute of limitations, is not a necessary result of a failure to comply with the 120 day service period prescribed by the rule. Furthermore, Rule 4 (m)'s emphasis on allowing cases to proceed on their merits, with or without a "good cause" showing as to why service was not effectuated within 120 days, reiterates a disdain for the harsh and inflexible interpretation of Rule 4(j). Wall's case now presents a factual situation which supports the very reasons for this Court's clarification of Rule 4(j). It will be consistent with this Court's proposed rule change to permit Wall to proceed with his claim on its merits.

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[3] "Any actual prejudice that Wall may suffer from the dismissal of his complaint in accordance with Rule 4(j) is a necessary result of his failure to comply with the rule. (emphasis added). Decision of the United States Court of Appeals for the Eighth Circuit, filed on March 26, 1993 in this matter.

**PROPOSED RULE 4(m) RESPONDS TO AND HIGHLIGHTS THE EXTENT TO WHICH COURTS HAVE MISINTERPRETED RULE 4(j).**

A. Dismissal of Wall's claim violates 4(j)'s express terms requiring a dismissal "without prejudice."

Fed. R. Civ. P. 4(j) states:

> **Summons: Time Limit for Service:** If a service of the summons and complaint is not made within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. . . . (emphasis added).

Although 4(j) expressly states that the action shall be dismissed without prejudice, courts have dismissed cases even though the expiration of the applicable statute of limitations effectively renders the dismissal "with prejudice."[4]

> Whether a claim may be barred by the applicable statute of limitations is not an issue before this court, nor is it relevant to this court's good cause inquiry. August 5, 1992 Decision of the United States District Court for the Northern District of Iowa in this matter (citing ***Floyd v. United States***, 900 F.2d 1045, 1048 (7th Cir. 1990)).
>
> Any actual prejudice that Wall may suffer from the dismissal of his complaint in accordance with Rule 4(j) is a

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[4] ***Friedman v. Estate of Presser***, 929 F.2d 1151, 1158 (6th Cir. 1991); ***Santos v. State Farm Fire & Cas. Co.***, 902 F.2d 1092, 1094 (2nd Cir. 1990); ***Powell v. Starwalt***, 866 F.2d 964, 966 (7th Cir. 1989); ***Geiger v. Allen***, 850 F.2d 330, 334 (7th Cir. 1988); ***Norlock v. City of Garlin***, 768 F.2d 654, 658 (5th Cir. 1985); ***U.S. For Use & Benefit of Deloss v. Kenner General***, 764 F.2d 707, 711, N. 5 (9th Cir. 1985); ***Wei v. State of Hawaii***, 763 F.2d 370, 372 (9th Cir. 1985).

> necessary result of his failure to comply with the rule. (emphasis added). Decision of the United States Court of Appeals for the Eighth Circuit filed March 26, 1993 in this matter.
>
> A dismissal without prejudice under Rule 4(j) for failure to serve is intended to leave the plaintiff in the same position as if the action never had been filed. This becomes a difficult question when the statute of limitations has expired between the filing of the complaint and a dismissal of the action. The dismissal is not really without prejudice if the plaintiff's action is now barred by the running of the limitations period. ***Gallian v. Guth Dairy, Inc.***, 136 F.R.D. 110, 111 (W.D. La. 1991). See also ***Ditkof v. Owens-Illinois, Inc.***, 114 F.R.D. 104, 105 (E.D. Mich. S.D. 1987) (refusing to dismiss a claim based partly on a potential violation of the Statute of Limitations as preventing plaintiff from re-filing her claim).

Commenting on the proposed change to F.R.C.P. 4(j), the Gallian court stated:

> The problem [running of the statute of limitations leading to a dismissal 'with prejudice'] may not arise in the future provided that a proposed amendment to Rule 4 becomes effective. The Judicial Conference has recommended that the language of Rule 4(j), to be renumbered as Rule 4(m), be amended to allow the Court to dismiss an action without prejudice for failure to serve within 120 days after filing, or direct that service be effected within a specified time. This much broader discretion granted to district courts is clearly an indication that the Judicial Conference seeks to avoid undue prejudice to plaintiffs under Rule 4(j). Id.

In 1991, the Judicial Conference recommended that the Supreme Court amend Rule 4(j) to grant relief to plaintiffs whose claims would be time-barred if dismissed "without prejudice." While the Supreme Court did not transmit the

changes to Rule 4 to Congress in 1991, changes to Rule 15, incorporating a reference to "new" Rule 4(m) were enacted. See Fed. R. Civ. P. 15(c)(3). In 1992 the Judicial Conference again recommended proposed Rule 4(m) to the Supreme Court for approval. Amendments to the Federal Rules, including 4(m), were approved by the Supreme Court, and via an April 22, 1993, communication from the Chief Justice to the Speaker of the House of Representatives transmitted to Congress for approval.

Proposed Rule 4(m) reads:

> **Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. (emphasis added).

The Advisory Committee comments state:

> The new subdivision [(m)] explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days, and authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown. Such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example, if the applicable Statute of Limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service. See e.g., ***Ditkof v. Owens-Illinois, Inc.***, 114 F.R.D. 104 (E.D. Mich. 1987). (emphasis added).

If Wall's claim is dismissed pursuant to a harsh interpretation of Rule 4(j), the dismissal will contravene the express lan-

guage of 4(j) mandating dismissals "without prejudice." In keeping with the recommendation of proposed Rule 4(m), a district court should avoid dismissals "without prejudice" which essentially amount to dismissals "with prejudice" when the applicable statute of limitations has run.

B. Revised Rule 4(m) indicates that 4(j) was intended to give courts greater discretion in determining whether to allow cases like Richard Wall's to proceed on their merit.

Rule 4(j), in its current version does not define, nor provide examples of "good cause". ***Patterson v. Brady***, 131 F.R.D. 679, 682 (S.D. Ind. 1990). Likewise, its legislative history provides no further insight aside from mentioning evasion of service as an example of "good cause". Id. (Citing 1982 U.S.C. Cong. & Admin. News 4434, 4446 n.25); ***Wei v. State of Hawaii***, 763 F.2d 370, 371 (9th Cir. 1985). Irrespective of this lack of legislative support, courts throughout the United States have given 4(j) an exceedingly unyielding interpretation. Specifically, although evasion of service is given as an example of "good cause", courts have virtually limited the good cause exception contained in 4(j) to instances where it was somehow physically impossible to serve the defendant.

The rule does not preclude other circumstances which may qualify as "good cause" for why service was not made within 120 days. Nevertheless, violation of a local rule by the clerk of court in failing to notify a plaintiff of the upcoming service deadline, actual notice of the suit/lack of prejudice,[5] and ongoing settlement negotiations[6] have been ruled out as "good cause" by various courts, although neither the rule nor its legislative history express an intent to so limit 4(j)'s good cause exception. This approach culminates in courts preventing cases from proceeding on their merits and refusing to

exercise any discretion in determining whether certain circumstances constitute "good cause" and/or whether a dismissal "with prejudice" should be avoided even in the absence of good cause.

This inequitable result has not gone unnoticed. The just disposition of every action is the overriding goal of the Rules of Civil Procedure as a whole, and Rule 4(j) is no exception. ***Green v. MAPCO Petroleum, Inc.***, 133 F.R.D. 506, 510 (D.W.D. Tenn. 1990). See also ***Arroyo v. Wheat***, 102 F.R.D. 516, 518 (D. Nev. 1984). Rule 4(j) ". . . was not meant to be enforced harshly or inflexibly." ***Floyd v. United States***, 900 F.2d 1045, 1049 (7th Cir. 1990). Failure to serve the Complaint within 120 days does not, in and of itself, mandate dismissal. Id. at 1047. A good cause determination should take into account the "totality of circumstances." ***Green***, 133 F.R.D. at 510. (Noting Defendant's awareness of the action, that the claim was potentially time-barred, and ongoing communications between both parties while the 120-day service period ran.) Lack of prejudice does present a factor in the ultimate

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[5] ***Bryant v. Brooklyn Barbeque Corp.***, 130 F.R.D. 665, 668 (W.D. Mo. 1990), aff'd 932 F.2d 697 (8th Cir. 1991), cert. denied, 112 S.Ct. 638 (1991); ***Friedman v. Estate of Presser***, 929 F.2d 1151, 1155 (6th Cir. 1991); ***Floyd***, 900 F.2d 1045, 1048 (7th Cir. 1990); ***Leonard v. Stuart-James Co., Inc.***, 742 F.Supp. 653, 662 (N.D. Ga. 1990); ***Gitz v. St. Tammany Parish Hospital***, 125 F.R.D. 138, 139 (E.D. La. 1989); ***In Re: City of Philadelphia Litigation***, 123 F.R.D. 512, 514 (E.D. Pa. 1988); ***In Re: City of Philadelphia Litigation***, 123 F.R.D. 515, 518-519 (E.D. Pa. 1988); ***Smith v. Pennsylvania Glass Sand Corp.***, 123 F.R.D. 648, 652 (N.D. Fla. 1988); ***Bryant v. Rohr Industries, Inc.***, 116 F.R.D. 530, 532-533 (W.D. Wash. 1987); ***Davis-Wilson v. Hilton Hotels Corp.***, 107 F.R.D. 505, 509 (E.D. La. 1985).

[6] ***Vincent v. Reynolds Memorial Hospital***, 141 F.R.D. 436, 437-438 (N.D. W.Va. 1992); ***Gitz v. St. Tammany Parish Hospital***, 125 F.R.D. at 139; ***Leonard***, 742 F.Supp. at 662; ***Davis-Wilson v. Hilton Hotels Corp.***, 106 F.R.D. 505, 509 (E.D. La. 1985); ***Sallow v. Circus-Circus Hotels, Inc.***, 108 F.R.D. 394 (D. Nev. 1985).

determination of whether to dismiss a claim. ***Floyd***, 900 F.2d at 1049. See also Patterson v. Brady, 131 F.R.D. 679, 682 (S.D. Ind. 1990); ***Assad v. Liberty Chevrolet, Inc.***, 124 F.R.D. 31 (D.R.I. 1989); ***Gordon v. Hunt***, 116 F.R.D. 313, 321 (S.D. N.Y. 1987); ***Dashner v. Kate***, 65 B.R. 492, 494 (N.D. Ia. 1986); and ***United States v. Coffee Co., Inc.***, 100 F.R.D. 413, 417 (D. Me. 1983).

Finally, this Court has responded to current interpretations of 4(j) with its approval and transmission of a proposed successor to 4(j) to Congress which will give courts greater discretion to allow cases proceed on their merits, and avoid dismissals with prejudice. The language and commentary to proposed Rule 4(m) indicate a preference for a more liberal approach to timely service, with an emphasis on allowing cases to proceed on their merits.[7] The proposed Rule also indicates a disdain for the overly formalistic and incorrect interpretation currently applied to Rule 4(j).

Pursuant to the Federal Rules' preference for allowing cases to proceed on their merits, and as evidenced by proposed Rule 4(m), the circumstances in this case warrant the exercise of a court's discretion in finding a "good cause" failure to serve the complaint within 120 days. Specifically, participation in on-going settlement negotiations, actual notice via receipt of a copy of the complaint on the date of its filing, a corresponding lack of prejudice to the defendant, violation of a local rule intended to apprise plaintiffs of the 120 day service deadline, in concert with the loss of a right to bring his action via the running of the applicable statute of limitations, present the ideal case for a court to exercise its discretion and allow an action to proceed on its merits. Conversely, a defendant with notice of the complaint and who has participated in

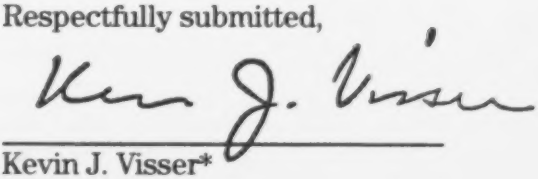
[7] See supra. pg. 9.

on-going settlement negotiations, should not be allowed to respond to a tardy notice by the Clerk of Court and seek to have a plaintiff's case dismissed by relying on an exceedingly formalistic interpretation of Fed. R. Civ. P. 4(j).

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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**APPENDIX TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

A. Judgment and Opinion of the United State Court of Appeals for the Eighth Circuit entered on March 26, 1993 in *Wall v. Rockwell International Corporation*, No. C 92-3004 ..... 1a

B. Decision and Order entered by the United District Court for the Northern District of Iowa on August 5, 1992 in *Wall v. Rockwell International Corporation*, No. 91-0194 ..... 3a

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-3004

| | | |
|---|---|---|
| Richard C. Wall, | * | |
| Appellant, | * | |
| v. | * | Appeal from the United |
| | * | States District Court |
| | * | for the Northern |
| Rockwell International Corporation, | * | District of Iowa. |
| | * | |
| | * | [UNPUBLISHED] |
| Appellee. | * | |

Submitted: March 17, 1993

Filed: March 26, 1993

Before BOWMAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

PER CUIAM.

Richard C. Wall appeals the order of the District Court dismissing Wall's age discrimination complaint without prejudice pursuant to Rule 4(j) of the Federal Rules of Civil Procedure for failure to serve the complaint on defendant Rockwell International Corporation within 120 days of the filing of the complaint. Wall contends that good cause existed for his failure to effect service within the 120-day period. He also argues that the dismissal of his suit will result in undue prejudice.

Having carefully considered the briefs and arguments of the parties, we affirm. The facts of the case are undisputed, the language of Rule 4(j) requiring service within 120 days of the filing of the complaint is unambiguous, and good cause why service was not made within the 120-day period has not been shown. Any actual prejudice that Wall may suffer from the dismissal of this complaint in accordance with Rule 4(j) is a necessary result of his failure to comply with the rule. We therefore cannot conclude that the District Court abused its discretion in granting Rockwell's motion to dismiss.

AFFIRMED. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

No. 92-3004

| | | |
|---|---|---|
| RICHARD C. WALL,<br>Plaintiff,<br>vs.<br><br>ROCKWELL INTERNATIONAL CORPORATION<br><br>Defendant. | ) | NO. C 91-0194<br><br>ORDER GRANTING DEFENDANT'S MOTION TO DISMISS |

Before the court ruling is defendant's resisted motion to dismiss. Defendant contends this case must be dismissed pursuant to Federal Rule of Civil Procedure 4(j); defendant was not served within 120 days of the filing of the complaint. Plaintiff responds that "good cause" exists for the delay.

Rule 4(j) provides in relevant part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the part on whose behalf such service was required cannot show good cause why such service was not made within that period, the actinon shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Fed. R. Civ. P.. 4(j).

There is no dispute that service was not made upon defendant within 120 days after the filing of the complaint. Plaintiff argues, however, that the following circumstances

constitute good cause: (1) defendant had actual notice that plaintiff had filed a complaint; (2) the parties were engaged in good faith settlement negotiations, which should be encouraged by the courts; (3) the statue of limitations may bar at least part of plaintiff's complaint if this case is dismissed; and (4) defendant will not suffer any prejudice if the case is allowed to proceed.

Whether a claim may be barred by the applicable statute of limitations is not an issue before this court, nor is it relevant to this court's good cause inquiry. See Floyd v. United States, 900 F.2d 1045, 1048 (7th Cir. 1990), and cases cited therein. Similarly, this court agrees with the Court of Appeals for the Seventh Circuit's conclusion that lack of prejudice alone cannot serve as an adequate foundation for a "good cause" determination. Id.

Plaintiff has offered reasons why this court should allow the case to proceed. But plaintiff has not offered any reasons why defendant was not served within the period provided by the Rule. See Vincent v. Reynolds Memorial Hosp., Inc., 141 F.R.D. 436, 437 (N.D. W.Va. 1992) ("[P]laintiff must have taken some affirmative action to effectuate service of process upon the defendant or have been prohibited, through no fault of his own, from taking such an affirmative action."). The few authorities cited by plaintiff are not on point; each concerned circumstances demonstrating that the failure to serve as attributable to persons other than the plaintiff. Plaintiff has not established good cause why defendant was not served and/ therefore, Rule 4(j) requires dismissal. See Fed. R. Civ. P. 4(j). Finally, it is noteworthy that the United States Supreme Court recently rejected a committee proposal that would have

granted greater leniency for persons not complying with the 120 day service requirement. See Proposed Fed. R. Civ. P. 4(m).

This case shall be dismissed without prejudice.

IT IS SO ORDERED.

Dated this 3 day of August, 1992.

CHARLES R. WOLLE, JUDGE

UNITED STATES DISTRICT COURT

FILED
AUG 23 1993
OFFICE OF THE CLERK

No. 93-152

In The

# Supreme Court of the United States

October Term, 1993

RICHARD C. WALL,

*Petitioner,*

v.

ROCKWELL INTERNATIONAL CORPORATION,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

## QUESTIONS PRESENTED FOR REVIEW

1. Should a writ of certiorari be granted to decide the hypothetical question of whether the lower courts' rulings might have been different under a proposed amendment to Federal Rule of Civil Procedure 4(j)?

2. Whether a writ of certiorari should be granted to review the district court's exercise of discretion in finding as a fact, affirmed by the court of appeals, that good cause was not shown.

## PARTIES TO THE PROCEEDING

The names of the parties to the proceeding in the United States Court of Appeals for the Eighth Circuit are stated in the caption of the case in this Court. Rockwell has no parent company and the only subsidiary company not wholly owned in which it has an interest is Automotive Axles, Ltd.

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## STATEMENT OF THE CASE

Mr. Wall correctly states that written settlement proposals were exchanged before the complaint was filed August 6, 1991. (Pet. 4). However, after that there were no ongoing settlement discussions or negotiations. (App., *infra*, 1, 2).

August 6, 1991, Wall's attorney, Mr. Visser, wrote to Rockwell's attorney, Ribble, and enclosed a copy of the complaint he filed that day. In his letter Visser stated:

> "We have not yet made any decisions about when and whether to serve the Complaint, which I understand we need to do within 120 days." (App., *infra*, 3).

Pursuant to a request in that letter, Rockwell gathered statistical information and provided it to Visser October 22. That day Visser wrote to Wall stating he had received the data and:

> "As you can see from the statistical breakdown, it appears that the company managed to keep the numbers fairly close in this respect as well.
>
> I think we need to sit down and re-evaluate the status of the case, actions that may be taken, expenses, etc., no later than the middle of November." (App., *infra*, 5).

December 30, 1991, the clerk filed a notice of dismissal. In the application in resistance to the dismissal, filed by Visser January 7, 1992, he stated:

> "Counsel for the plaintiff has only recently determined that it will be unable to continue in its representation of the plaintiff." (App., *infra*, 7).

There had been no communication between counsel after October 22, 1991, *until Rockwell's attorneys* received the service copy of Wall's resistance filed January 7, 1992. (App., *infra*, 1, 2).

## SUMMARY OF THE ARGUMENT

Wall's statement of the "REASON FOR GRANTING THE PETITION" (Pet. 6) does not assert a special and important reason to grant the writ, as required by Rule 10.1.[1]

Wall's alternative argument, that "the circumstances of this case warrant the exercise of a court's discretion" to find good cause (Pet. 12), is not reason to grant the writ. The district court's exercise of discretion in finding as a fact that good cause was not shown, affirmed by the court of appeals, is not a special and important reason for this Court to grant the writ. This is particularly true absent a claim of abuse. Furthermore, the finding of lack of good cause is completely supported by the record.

## ARGUMENT

### A. The proposed amendment to Federal Rule of Civil Procedure 4(j) does not raise a special and important question in this case that should be settled by this Court.

The lower courts decided this case under Federal Rule of Civil Procedure 4(j). The only reason Wall asserts

[1] Every court of appeals decision cited by Wall supports the rulings of the lower courts in this case.

for granting the writ is the proposed amendment to that rule. This Court adopted the amendment and any further pronouncement on the matter would be redundant. The question of whether the lower courts' rulings might have been different under the proposed rule is hypothetical, pending action by Congress. In any event it is not an important question of federal law because the answer could benefit only Wall individually and not the public.[2]

**B. The district court's factual finding that Wall failed to show good cause, affirmed by the court of appeals, was correct, and a writ should not be granted to review it.**

Wall does not claim an abuse of discretion in the district court's finding. He only asserts that "the circumstances of this case warrant the exercise of a court's discretion" to find good cause. The circumstances he recites are ongoing settlement negotiations, actual notice of filing the complaint, lack of prejudice, fault of the clerk and running of the statute of limitations. (Pet. 12).

As the district court correctly observed:

> "Plaintiff has offered reasons why this court should allow the case to proceed. But plaintiff has not offered any reasons why defendant was not served within the period provided by the Rule." (Pet. App. 4a).

---

[2] " . . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Wall now implies as a reason that Rockwell wrongfully participated in "on-going settlement negotiations" and then relied on "an exceedingly formalistic interpretation" of the rule. (Pet. 12, 13). Apart from the doubtful persuasive value of such a claim, it is unfounded.

There was an exchange of written settlement proposals July 29 and August 5 and Rockwell provided requested statistics October 22, 1991. However, there were no settlement negotiations after the complaint was filed August 6, 1991. (App., *infra*, 1, 2).

The probable reason that service was not made is that Visser could not decide whether to do it. He wrote to Ribble when he filed the complaint:

> "We have not yet made any decisions about when and whether to serve the Complaint, which I understand we need to do within 120 days." (App., *infra*, 3).

October 22, when Rockwell delivered the statistics to Visser, he continued to deliberate whether to pursue the case. He wrote to Wall:

> "As you can see from the statistical breakdown, it appears that the company managed to keep the numbers fairly close in this respect as well.
>
> I think we need to sit down and re-evaluate the status of the case, actions that may be taken, expenses, etc., no later than the middle of November." (App., *infra*, 5).

January 7, 1992, in Wall's resistance to dismissal, Visser stated:

> "Counsel for the Plaintiff has only recently determined that it will be unable to continue in

its representation of the Plaintiff." (App., *infra*, 7).

It strongly appears that timely service was not made because Wall's counsel could not decide whether to pursue the case. If so, it is doubtful any district court would find that to be good cause, and it is certainly not a matter that warrants review by this Court.

## CONCLUSION

For these reasons Rockwell respectfully requests the Court to deny the petition.

Respectfully submitted,

D. G. Ribble, Counsel of Record
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of
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*Attorneys for Respondent*

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

| | | |
|---|---|---|
| RICHARD C. WALL,<br>Plaintiff,<br>vs.<br>ROCKWELL INTERNATIONAL CORPORATION,<br>Defendant. | ) | No. C 91-0194<br>**AFFIDAVIT** |

STATE OF IOWA )
) ss:
COUNTY OF LINN )

I, D. G. Ribble, on oath state:

1. After receiving Mr. Visser's letter dated August 6, 1992, (Exhibit C to plaintiff's brief), I obtained the information he requested.

2. The information required explanation to a person not familiar with Rockwell's records and I called Mr. Visser's office to arrange a meeting. Our office records show the following unsuccessful attempts by us to reach each other by telephone:

Tuesday, October 8, Ribble to Visser
Wednesday, October 9, Visser to Ribble
Thursday, October 10, Ribble to Visser
Friday, October 11, Visser to Ribble
Monday, October 14, Ribble to Visser
Wednesday, October 16, Visser to Ribble
Thursday, October 17, Ribble to Visser

Finally, Friday, October 18, I called Mr. Visser's secretary, and she made an appointment for me to see Mr. Visser at his office October 22. We met and I delivered to him and explained the information he requested.

3. At no time before Rockwell filed its motion to dismiss did I discuss with Mr. Visser the matter of service of summons. The decision to defer service was made unilaterally by plaintiff and was not the subject of any agreement between plaintiff and Rockwell.

4. At no time following Mr. McNett's letter dated August 5 to Mr. Visser (Exhibit B to plaintiff's brief) did I have authority to offer any different settlement suggestions or proposals, nor did I. Although Mr. Visser may have stated during our meeting October 22 that he wished the case could be settled, he never made a counteroffer in response to Mr. McNett's letter dated August 5. I had no communication with Mr. Visser after October 22 until I received the service copy of the resistance to dismissal he filed January 7, 1992.

/s/ D. G. Ribble
D. G. RIBBLE

Subscribed and sworn to before me March 10, 1992, by D. G. Ribble.

/s/ Lori S. Davisson
Notary Public in and for the
State of Iowa

[certificate of service deleted in printing]

MOYER & BERGMAN

ATTORNEYS AT LAW

[Law firm address and attorney names deleted in printing]

August 6, 1991

Mr. Donald G. Ribble
Attorney at Law
526 2nd Avenue SE
P. O. Box 2457
Cedar Rapids, IA 52406-2457

Re: Richard Wall v. Rockwell International
Dear Don:

Enclosed is a copy of the lawsuit filed on Dick Wall's behalf today in the United States District Court. I am forwarding this copy to you for your reference.

We have not yet made any decisions about when and whether to serve the Complaint, which I understand we need to do within 120 days.

In the meantime, Mr. Wall is considering the information that you have previously generated through Mr. McNett's letter and through our discussions.

One additional piece of fact information that Mr. Wall has asked that we elicit is this: Mr. Wall would like to know in the specific group of salaried employees in the engineering or professional area, what the age impact was. He feels this was the relevant group and believes that the statistics may not be quite so favorable when looking at

this limited group as opposed to the work force as a whole. Any information you could provide me in this regard might be very helpful in having me work with Mr. Wall for purposes of further evaluating the merits of his claim.

Very truly yours,

MOYER & BERGMAN
/s/ Kevin J. Visser
Kevin J. Visser

KJV/lac

cc: Richard Wall

MOYER & BERGMAN

ATTORNEYS AT LAW

[Law firm address and attorney names deleted in printing]

October 22, 1991

Mr. Richard C. Wall
5650 Colorado Drive S.W.
Cedar Rapids, IA 52404

PERSONAL AND CONFIDENTIAL

Dear Dick:

Attorney Ribble delivered to me the enclosed Summary Analysis of layoffs within the engineering department alone.

As you can see from the statistical breakdown, it appears that the company managed to keep the numbers fairly close in this respect as well.

I think we need to sit down and re-evaluate the status of the case, actions that may be taken, expenses, etc., no later than the middle of November.

Very truly yours,
MOYER & BERGMAN
Kevin J. Visser

KJV/lac

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

| | |
|---|---|
| RICHARD C. WALL<br>Plaintiff,<br>vs.<br>ROCKWELL INTERNATIONAL CORPORATION,<br>Defendant. | NO. C 91-0194<br>APPLICATION IN RESISTANCE TO INVOLUNTARY DISMISSAL |

COMES NOW the Plaintiff, Richard C. Wall, through his counsel of record, and states:

1. It is contrary to the interests of justice that this matter be involuntarily dismissed, as the merits of Plaintiff's claim will be compromised in so doing.

2. Plaintiff's primary claim is for age discrimination. This action was filed only shortly before the expiration of the statute of limitation for plaintiff's claim pursuant to 29 U.S.C. 621, et seq. A dismissal at this time will work to prevent a disposition of plaintiff's claim upon the merits.

3. The Complaint and Summons have not yet been formally served upon the Defendant. However, active discussions have been ongoing between counsel for the parties for the past 12 months, including an exchange of information as recently as late October. These efforts to

resolve Plaintiff's claim independently of the judicial system should be credited. The Defendant has been informally advised of the filing of the Complaint and has been provided with a copy of the pleading.

4. Counsel for the Plaintiff has only recently determined that it will be unable to continue in its representation of the Plaintiff. The Plaintiff wishes, in the strongest terms, to continue the prosecution of his claim.

5. It is respectfully submitted that the Plaintiff be granted 60 days in which to procure successor counsel to prosecute this claim.

Respectfully submitted,

MOYER & BERGMAN

By _____

Kevin J. Visser 000005739
2720 First Avenue NE
P. O. Box 1943
Cedar Rapids, IA 52406-1943
Telephone: (319) 366-7331

ATTORNEYS FOR PLAINTIFF